No. 82-1071

# In the Supreme Court of the United States

OCTOBER TERM, 1983

ALUMINUM COMPANY OF AMERICA, et al.,
*Petitioners,*

v.

CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.
*Respondents,*

and

PETER JOHNSON, as Administrator of the BONNEVILLE POWER ADMINISTRATION, Department of Energy, and DONALD PAUL HODEL, as Secretary of the DEPARTMENT OF ENERGY, and the UNITED STATES OF AMERICA,
*Respondents.*

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

## BRIEF FOR RESPONDENTS CENTRAL LINCOLN PEOPLES' UTILITY DISTRICT, et al.

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## QUESTION PRESENTED

Whether legislation that expressly preserves the longstanding priority of publicly-owned utilities to all power sold by the Bonneville Power Administration, nevertheless, abolishes by implication that priority for nonfirm energy sales and requires Bonneville to sell nonfirm energy first to fourteen private industries?

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## MISCELLANEOUS

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## INTRODUCTION

Petitioners' and federal respondents' statements of the case are inconsistent with the public position of the Bonneville Power Administration (BPA) prior to this litigation. Both statements omit material facts, including the disagreement between the petitioners and BPA over the extent of petitioners' "right" to nonfirm energy. Also, petitioners' statement of the case offers an inaccurate portrayal of federal power operations and sales in the Pacific Northwest and of the origin and content of the Pacific Northwest Electric Power Planning and Conservation Act (Regional Act). Therefore, these publicly-owned utility respondents present a statement of the case.

## STATEMENT OF THE CASE

### I. The Regional Act and Its Background

In 1937 Congress created BPA to market electric power to be produced at the Bonneville project on the Columbia River. In section 4(a) of the legislation, Congress mandated that BPA allocate this power according to a specific priority:

> In order to insure that the facilities for the generation of electric energy at the Bonneville project shall be operated for the benefit of the general public, and particularly of domestic and rural consumers, *the administrator shall at all times, in disposing of electric energy generated at said project, give preference and priority to public bodies and cooperatives.*[1]

Congress later gave the Secretary of the Interior authority to market public power generated from federal dams constructed under the Reclamation Act of 1939[2] and

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[1] 16 U.S.C. §832c(a) (1976). [Emphasis added] Petitioners discuss preference under the Bonneville Project Act but omit this controlling section. *See* Pet. Br. 3, 13-14.

the Flood Control Act of 1944.[3] The Secretary of the Interior delegated this authority to BPA for dams in the Pacific Northwest.[4] In these two statutes Congress mandated that preference in the allocation of all public power be given to publicly-owned utilities.[5] All three statutes permitted BPA to sell to privately-owned companies electric power in excess of the full requirements of the publicly-owned utilities.[6]

For nearly forty years BPA had sufficient power to meet the requirements of the publicly-owned utilities it was created to serve. In 1976, however, BPA informed the publicly-owned utilities that it would no longer be able to meet their full requirements.[7] Earlier, applying its statutory mandate for priority to these utilities, BPA had notified its other customers, the privately-owned utilities and the specially-served industries, that it could not renew their contracts.[8] For BPA to continue to meet its

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[2]Act of August 4, 1939, 53 Stat. 1187-98 , 43 U.S.C. §§485-85k (1979).

[3]Act of December 22, 1944, Pub. L. No. 78-534, 58 Stat. 887-907 (codified in scattered sections of titles 16, 33 and 43 U.S.C.).

[4]*E.g.*, 22 Fed. Reg. 9196 (1957) (ten reclamation dams and three flood control dams). Later, Congress designated BPA as the marketing agent for all federal power generated in the Pacific Northwest. 16 U.S.C. §838f (Supp. III 1979).

[5]*See* 43 U.S.C. §485h(c); 16 U.S.C. §825s.

[6]*See* 16 U.S.C. §832d(b); 43 U.S.C. §485h(c); 16 U.S.C. §825s.

[7]This "notice of insufficiency" prompted the consideration of regional legislation. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash. L. Rev. 175, 228 (1983). BPA could not meet the power needs of the publicly-owned utilities because its power supplies were insufficient and sites for new hydroelectric generating facilities were not available. *See* H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 27-30 (1980); H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 24-25 (1980).

[8]H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 29-30 (1980); H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 24-25 (1980). BPA advised Congress that it was "legally precluded" from signing new contracts with the privately-owned utilities and specially-served industries. H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 37 (1980).

customers' needs, it required authority from Congress to acquire new power resources.

Congress recognized that such legislation could not be enacted without a consensus among all BPA customers. The regional consensus could be obtained only if:

> (1) the DSI's are able to trade in their existing low-cost power contracts for new contracts at higher rates; (2) the low-cost power released by the DSI's can be made available to residential and small farm customers of regional IOU's; and (3) the preference rights of publicly-owned and cooperative utility systems can be preserved.

H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 36 (1980); *see also id.* 27.

In 1980, Congress gave BPA the authority to acquire additional generating resources in the Regional Act. 16 U.S.C. §839d (Supp. V 1981). This new authority allowed BPA to meet the needs of the publicly-owned utilities and to preserve their priority entitlement to all BPA power sales, while continuing service to the specially-served industries and providing rate relief to the privately-owned utilities. The necessary consensus had been achieved:

> The bill avoids the administrative reallocation problem by authorizing BPA to add to its power supply so that it can meet the needs of all its customer classes. The bill does so under power supply and rate provisions that are acceptable to all classes of BPA customers, and that fully protect the preference rights of public bodies and cooperatives.[9]

The Regional Act is a complex statute, but it contains a straightforward scheme for allocation of the federal power supply. Sections 5(a) and 10(c) are all-inclusive provisions that maintain the publicly-owned utilities' priority to all BPA power sales. 16 U.S.C. §§839c(a),

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[9] 126 Cong. Rec. H9850 (daily ed. Sept. 29, 1980) (Rep. Swift); *see also id.* S14690 (daily ed. Nov. 19) (Sen. Jackson); *id.* H10677 (daily ed. Nov. 17) (Rep. Duncan); *id.* H10524 (daily ed. Nov. 12) (Rep. Swift and Rep. Duncan); *id.* H9843 (daily ed. Sept. 29) (Rep. Ullman); *id.* H9845 (Rep. Bujan); *id.* H9849 (Rep. Moorhead).

839g(c). Section 5(b) creates a further obligation for BPA to meet the net firm load requirements of the publicly and privately-owned utilities. 16 U.S.C. §839c(b). Section 5(c) allows chiefly the privately-owned utilities to exchange with BPA higher cost power produced by their own generating facilities for an equivalent amount of lower cost federal power.[10] Section 5 (d) provides that the specially-served industries receive long-term contracts for an amount of power equivalent to that to which they were entitled under their pre-Regional Act contracts. 16 U.S.C. §839c(d) .

BPA, however, could not legally enter the contracts required by section 5 because it did not have sufficient power resources. Therefore, Congress created a legal fiction by "deeming" that BPA had sufficient power resources to support the contracts.[11]

## II. Publicly-Owned Utilities' Preference and Priority to Federal Power

Since 1906, our national policy has provided that publicly-owned utilities have preference over private

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[10]16 U.S.C. §839c(c). In practice no transfer of power takes place; this exchange is merely a paper transaction which provides a subsidy to the customers of the privately-owned utilities. Finklea, *Bonneville Power Administration Ratemaking: An Analysis of Substantive Standards and Procedural Requirements*, 13 Envt'l L. 929, 944 (1983) (hereafter, Finklea). BPA indicates that it is to recover the costs of this exchange by charging higher prices to the specially-served industries. Fed. Br. 7-8; *see also* Pet. Br. 18; H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 35 (1980). BPA, however, has interpreted the Regional Act to require that the publicly-owned utilities pay *over $250,000,000* of the total exchange costs for the 1984 rate year. BPA *1983 Final Rate Proposal, Wholesale Power Rate Design Study*, tables 12 and 17 (Sept. 1983).

[11]16 U.S.C. §839c(g)(7). Petitioners grossly distort the meaning of that section by inserting bracketed material into a quotation from legislative history. *See* Pet. Br. 16 n. 39. Petitioners' bracketed insertion is inappropriate and apparently intended to show that the section overrides preference and priority. The legislative history, however, immediately after the phrase quoted by petitioners states: "This provision does not override any other provision of this bill." H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 64 (1980).

entities in the sale of public power generated at federally-owned hydroelectric dams.[12] Preference clauses provide the controlling mandate to agencies marketing federally-produced power.[13] Through preference clauses Congress intended publicly-owned utilities "whenever possible, to benefit from the sale of low-cost federal power,"[14] and intended "to provide low-cost power to the greatest number of consumers."[15]

Congress designed the preference and priority requirements of the Bonneville Project Act in response to industry's monopolization of the power produced at the Niagara hydroelectric project.[16] The Bonneville Project

[12]*See generally* White, *The Right to Federally Generated Power*, American Public Power Association (1979); Fereday, *The Meaning of the Preference Clause in Hydroelectric Power Allocation Under the Federal Reclamation Statutes*, 9 Envt'l L. 601 (1979); Solicitor, Department of the Interior, *History of the Preference Clause* (1958).

[13]Petitioners, however, have created a law review article that relegates preference and priority to a congressional afterthought in the Regional Act and numerous other power marketing statutes. *See* Pet. Br. 15 n. 33, *citing* Redman, *Preference and Other Clauses in Federal Power Marketing Acts*, 13 Envt'l L. 773 (1983). The perceived necessity to write a law review article concerning a main aspect of this case and criticizing the Ninth Circuit's decision while litigation is pending demonstrates the weakness of the petitioners' arguments. The Court should ignore this heavyhanded attempt by petitioners to create support for their position. The simple answer to the article is that preference is the prime statutory allocation in most federal power marketing statutes, not a congressional suggestion to be followed or not as administrative discretion dictates. See sources cited in note 12 *supra* and Farris, *The Economic Significance of the Preference Clause in Public Water Policy on the Development of the Pacific Northwest* 28-83, (unpublished Ph.D. Dissertation) (1957), Univ. Microfilms, Ann Arbor, Mich.

[14]*City of Santa Clara v. Andrus*, 572 F.2d 660, 671 (9th Cir.) *cert. denied sub nom. Pacific Gas & Electric Co. v. City of Santa Clara*, 439 U.S. 859 (1978).

[15]*Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708, 714 (9th Cir. 1982).

[16]81 Cong. Rec. 7524, 7540-41 (1937) (Rep. Rankin); *id.* 7606-13. For example, at the Niagara Falls hydroelectric project, the Aluminum Company of America and associated electroprocessing companies consumed at bargain rates up to 90 percent of the power produced. *Id.* 7608-09. The rate paid by the electroprocessing industries in 1935 was

Act contains significant preference provisions in addition to the controlling provision quoted earlier.[17] All of these provisions emphasize the national policy of giving publicly-owned utilities priority to federal power.

Congress preserved all of these preference and priority provisions in the Regional Act without qualification or limitation: Section 5(a) of the Act, 16 U.S.C. §839c(a), provides:

> All power sales under this Act shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof.

Congress also protected the preference provisions of other federal laws applicable to BPA power sales. Section 10(c) of the Act, 16 U.S.C. §839g(c), provides:

> Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

Earlier versions of this legislation were not as clear. Congress added forceful language to the Regional Act because of concerns that ambiguous language in earlier versions might permit someone to later assert that

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1.3 mills per kilowatt-hour while the average price of power from the project was 3.1 mills per kilowatt-hour. There was little power for public consumption and the power rates paid by most residential consumers were many times that of the industries. The Niagara disaster threatened to reoccur at Bonneville. *Id.* 7609 (Rep. Smith); *see Columbia River Navigation: Hearings on H.R. 4948 Before House Comm. on Rivers and Harbors,* 75th Cong., 1st Sess. 180-95 (1937) (Rep. Pierce). Thus, Congress designed the Bonneville Project Act to prevent the monopolization of power by "limited groups." 16 U.S.C. §832a(b).

[17]The preference provisions of the Act reserve fifty percent of BPA's capacity for future public acquisition, 16 U.S.C. §832c(b) [section 4(b)]; require five-year "callback" provisions on any contracts to private utilities, 16 U.S.C. §832d(a) [section 5(a)]; and provide a reasonable time for any publicly-owned utility to become a qualified purchaser, 16 U.S.C. §832c(d) [section 4(d)], or to secure financing, 16 U.S.C. §832c(c) [section 4(c)].

preference and priority applied only to uncommitted power,[18] the assertion made by the petitioners and BPA in their statements of the case. *See* Fed. Br. 7, 10; Pet. Br. 5, 18. Congress added sections 5(a) and 10(c) to preclude that argument and to make its intent as to preference clear.[19]

## III. Publicly-Owned Utilities' Service to Pacific Northwest Consumers

These twelve publicly-owned utility respondents include utilities with and without their own generating facilities and range from the largest publicly-owned utility in the Northwest, Seattle City Light, to one of the smallest, Northern Wasco County Peoples' Utility District.[20] They

[18]See the statement by a representative of the American Public Power Association at pp. 25-26 *infra*.

[19]Representative Swift, the sponsor of the bill that became the Regional Act, stated:

> The bill does not violate the preference clause: The bill has been heavily amended to insure full protection of the traditional preference rights of public bodies and cooperatives. The Public Power Council, the National Rural Electric Cooperative Association, and the American Public Power Association are in full agreement that the bill in its present form protects preference.

126 Cong. Rec. H9851 (daily ed. Sept. 29, 1980); *see also* H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 46 (1980); H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 34, 59 (1980).

[20]There are 116 publicly-owned preference utility customers of BPA. They purchase nearly 60 percent of BPA's firm power. They do not operate for profit and sell power to their customers at the lowest possible cost. *See* 16 U.S.C. §832d(a). They range in size from large municipal utilities serving residential, commercial and industrial needs of metropolitan areas to small rural cooperatives serving farms and farming communities. Many of the publicly-owned utilities purchase all of their power from BPA. Some of them own generating facilities that serve a part of their load and purchase additional priority power from BPA. *See* H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 27 (1980); BPA, *Draft Environmental Impact Statement, The Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* (hereafter, *Draft EIS*), Appendix C, at I-13 to I-15 (1977). In contrast those of BPA's specially-served industrial customers that are aluminum companies purchase over 30 percent of BPA's power and employ about one-half of one percent of the region's work force. Blumm, *The Northwest's Hydroelectric Heritage: Prologue to the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash. L. Rev. 175, 179 (1983).

together serve over 560,000 residential customers, 60,000 commercial customers and 2,000 industrial customers.[21]

BPA sells power to the publicly-owned utilities under two different labels — "firm" and "nonfirm."[22] Publicly-owned utilities have had a statutory right as well as a contractual right to BPA nonfirm power for nearly forty years.[23]

Publicly-owned utilities with their own generating facilities use BPA nonfirm energy primarily to continue to serve their customers when the generating facilities are unable to produce sufficient power. This inability occurs when equipment breaks down or water levels at their own reservoirs are depleted. *See* J.A. 50-51, 116-17; Affidavit of Gerald R. Garman 5 (filed Aug. 31, 1981); Affidavit of Lawrence A. Dean 10 (filed Sept. 9, 1981).

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[21] *See Draft EIS*, note 20 *supra*, Appendix C, Attachment B, at B-8 to B-13.

[22] *Central Lincoln Peoples' Utility District v. Johnson*, 686 F.2d 708, 710 (9th Cir. 1982); BPA, *Final Environmental Impact Statement, The Role of the Bonneville Power Administration in the Pacific Northwest Power Supply System* (hereafter, *Final EIS)* at IV-69 to IV-70 (1980). Firm power is the amount of power which BPA, relying primarily on a hydroelectric generating system, can deliver even in the driest or "critical" years. In most years, BPA reservoirs have more water from rain and snowmelt than in a critical year, and BPA can generate additional power. BPA labels this additional power nonfirm.

[23] Petitioners state, without a factual basis, that BPA has never had a contractual obligation to supply publicly-owned utilities with nonfirm energy. P.B. 12-13. Since the late 1930's publicly-owned utilities have had a contractual right to purchase nonfirm energy and BPA has had an obligation to sell nonfirm energy to them when it is available. *See Second Annual Report of the Administrator of the Bonneville Power Administration*, H. Doc. 612, 76th Cong., 3d Sess. 8 (1940); Witness Statement of Gerald R. Garman 3 (filed Sept. 11, 1981); Preference Customer Memorandum (9th Cir.) 11; Preference Customer Reply Memorandum (9th Cir.) 24. The City of McMinnville signed one of the first nonfirm energy contracts with BPA in 1940. *Second Annual Report of the Administrator of the BPA Power Administration*, H. Doc. 612, 76th Cong., 3d Sess. 8 (1940). McMinnville owned a hydroelectric plant and a diesel generating plant for which it could use the nonfirm energy for backup and displacement. *Id.*

Publicly-owned utilities also use nonfirm energy to continue service to their customers when it is necessary to shut down generating facilities or reduce levels of generation for maintenance. Finally, these publicly-owned utilities occasionally shut down an expensive thermal facility and replace that power with nonfirm energy purchased from BPA.[24] These limited purchases enable the utilities to reduce costs to their customers to the lowest possible level and to follow national energy policy.[25]

Both generating and nongenerating publicly-owned utilities make other uses of BPA nonfirm energy. BPA now sells nonfirm energy to publicly-owned utilities for sale to farmers for use in irrigation of farmland that

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[24]Four of these publicly-owned utility respondents own thermal generating facilities — City of Eugene, Eugene Water and Electric Board, 51 megawatts of cogeneration; City of Seattle, City Light Department, 750 kilowatts of combustion turbine, 30 megawatts of steam generation and 112 megawatts of the Centralia coal project; City of Tacoma, Department of Public Utilities, 112 megawatts of the Centralia coal project; and Public Utility District No. 1 of Snohomish County, 112 megawatts of the Centralia coal project. *See* Mentor, et al., *The Preference Clause Revisited: Central Lincoln Peoples' Utility District v. Johnson and the Pacific Northwest Electric Power Planning and Conservation Act*, 58 Wash. L. Rev. 413, 429 n. 124 (1983).

[25]*See* 16 U.S.C. §2601 (Supp. III 1979); 42 U.S.C. §8301 (Supp. V 1981). Petitioners ignore the record before the Ninth Circuit regarding the uses of nonfirm energy by publicly-owned utilities and assert, without a factual basis, that publicly-owned utilities purchase nonfirm energy from BPA "for resale to entities other than their own retail customers." Pet. Br. 6; *see also id.* 12-13. Petitioners made the same argument to the Ninth Circuit. The Ninth Circuit concluded: "The present case is not one in which a preference customer profits from selling power acquired through the preference to the industries who also want the power. Here, the preference customers want the low-cost power for their customers." 686 F.2d at 715 n. 9. These publicly-owned utilities have always purchased nonfirm energy for service to *their own customers*. Their BPA contracts prohibit the resale of any nonfirm energy purchased from BPA. *See* BPA, IX Contract Official Records (hereafter, COR) 2454 [§60] (1980).

otherwise would be barren.[26] Publicly-owned utilities also supply BPA nonfirm energy to industries for use in place of fossil fuels.[27]

## IV. BPA's Historical Nonfirm Energy Sales

Prior to the Regional Act, BPA generally sold firm power through multi-year commitments. BPA sold nonfirm energy, if available, only on an hourly basis. *Final EIS*, note 22 *supra*, *at* IV-71; Affidavit of Lawrence A. Dean 7-8 (filed Sept. 9, 1981); *see* 48 Fed. Reg. 33518, 33521 (1983).

Each hour, BPA determined how much nonfirm energy it had available for sale. No BPA customer could rely on the continued availability of nonfirm energy. Any sales by BPA of nonfirm energy could be stopped, at any time, if BPA needed the energy to meet its firm load requirements. This was the mechanism by which nonfirm sales provided "reserves" for BPA's firm power customers. *See Port of Astoria v. Hodel*, 595 F.2d 467, 471 (9th Cir. 1979). All purchasers of nonfirm energy potentially provided these reserves.[28]

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[26]48 Fed. Reg. 38533 (1983). The cost of electricity which BPA sells to publicly-owned utilities has increased dramatically. Since 1979 the publicly-owned utility rate from BPA has increased approximately 300 percent. *The Oregonian*, Oct. 1, 1983, at 1, col. 1. Such an increase prevents many areas of Eastern Oregon and Eastern Washington from being used as productive farm land because electricity rates are a critical factor in the economics of irrigation farming.

[27]48 Fed. Reg. 33518 (1983). This use comports with national energy policy. The industries include Boeing Commercial Airplane Co., Weyerhaeuser, and Longview Fibre.

[28]Contrary to BPA's assertion, recognition of the priority to publicly-owned utilities for nonfirm energy will not require acquisition by BPA of "additional generation capacity." *See* Fed. Br. 19. Sales of nonfirm energy to *any customer* can be interrupted and therefore, provide reserves.

Before selling nonfirm energy to any customer, BPA first used nonfirm energy to serve any firm loads for which there was insufficient firm energy available and to fill federal reservoirs in order to maintain its firm power capabilities. BPA then sold nonfirm energy to publicly-owned utilities as required by federal law.[29] If there was additional nonfirm energy available, BPA split it equally between the privately-owned utilities and the "first quartile" (one quarter) load of the specially-served industries. Finally, BPA sold any remaining nonfirm energy as "surplus"[30] energy to utilities outside the Pacific Northwest.[31]

The specially-served industries first began to purchase nonfirm energy in 1948. BPA began to sell nonfirm energy to the industries because there was not sufficient firm power available to sell to all potential purchasers and the industries were not priority purchasers.[32] Contrary to

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[29]*See* Regional Solicitor's Opinion, March 5, 1956, at 1; *Draft EIS*, note 20 *supra*, Appendix C, at III-29; *Final EIS*, note 22 *supra*, at IV-68, IV-70, and Attachment B at B-34 to B-35.

[30]Petitioners attempt to obscure the issues by stating that the publicly-owned utilities purchased "surplus" power before the Regional Act. *See* Pet. Br. 6, 12-13. The petitioners, through sophistry, equate the surplus power in section 5(f) of the Regional Act, 16 U.S.C. §839c(f), with the nonfirm energy purchased by public bodies before the Regional Act. Prior to the Regional Act, BPA did not sell surplus power to any customer in the Pacific Northwest; surplus power was a term of art meaning power surplus to the needs of the Pacific Northwest. *See also* 16 U.S.C. §837(c), (d).

[31]*Final EIS*, note 22 *supra*, at IV-70. As an example of the relative amounts of nonfirm energy sold by BPA to its customer groups, during fiscal year 1978 BPA sold approximately 250 million kilowatt hours to preference customers, 4,544 million kilowatt hours to the specially-served industries, 8,616 million kilowatt hours to the privately-owned utilities, and 6,246 million kilowatt hours outside the Pacific Northwest Region as surplus. *Id.*, at IV-69, table IV-8.

[32]*National Resources Policy: Hearings Before the Senate Committee on Interior and Insular Affairs*, 81st Cong., 1st Sess. 234 (1949) (Statement by BPA Administrator); BPA, *1948 Report on the Columbia River Power System* 26 (1948). At the same time, BPA indicated that because of a lack of sufficient firm power, any future sales to the specially-served

BPA's assertion, BPA did not begin the sales because they resulted in an "operational benefit" by providing reserves for other customers. *See* Fed. Br. 3.

Prior to the Act, the industries purchased nonfirm energy from BPA to serve their first quartile load, which was approximately 1,000 megawatts. There were three other sources of service for the first quartile load: (1) **Advance** — in the fall BPA provided "advance" energy by drawing down its reservoirs on the assumption that there would be sufficient snow and rain to refill them later in the year. Service could be halted later if the reservoirs do not refill. (2) **Shift** — BPA in planning the operation of the federal dams over a multi-year period shifted into the present year water which would ordinarily be saved in the reservoirs for use in later years. Service could be halted later if the reservoirs do not refill. (3) **Purchase** — BPA acted as a trust agent and purchased energy for the industries if they could not be served with federal power. *Final EIS*, note 22 *supra, at* IV-80, IV-84; Finklea, note 10 *supra*, 950-51.

For the five years prior to the Regional Act, pursuant to the industries' pre-Regional Act contracts, BPA

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industries for new loads would not be supplied on a firm basis, but would be served with nonfirm energy if available. BPA, *1948 Report on the Columbia River Power System* 26 (1948); *see also* BPA, *1951 Advance Program for Defense* 26 (1951).

BPA had no obligation to supply the load growth of the specially-served industries or even to attempt to supply the load growth. Congress created BPA to sell federal power from the Bonneville project to publicly-owned utilities. Petitioners, however, have created a second law review article to reverse this congressional decision and show how sales of nonfirm energy to the industries instead of other customers improves operating efficiencies for BPA. *See* Pet. Br. 9 n. 16 *citing* Redman, *Nonfirm Energy and BPA's Industrial Customers*, 58 Wash. L. Rev. 279 (1983). Again, the preceived need to create resource material to cite to the Court demonstrates the weakness of petitioners' arguments. The erroneous premise of the article is that BPA was obligated under the Bonneville Project Act to provide firm power for any and all loads the specially-served industries brought to the Pacific Northwest. An erroneous conclusion of the article is that sales of nonfirm energy to the specially-served industries' top quartile load are more efficient operationally than sales of nonfirm energy to any other BPA customer. *See* p. 10 *supra; see also Final EIS*, note 22 *supra*, Attachment B, at B-28 [comment no. 31].

provided federal power to the industries through a combination of advance, shift and nonfirm energy so that an average of 91.75 percent of the industries' total load was served.[13] During that same period BPA made trust agency purchases, that were not provided for in the contracts, so that the industries' first quartile load could be fully served. In that way, 100 percent of the total industry load was served. Affidavit of Bruce E. Mizer 22 (filed Sept. 11, 1981).

The Regional Act tied the specially-served industries' entitlement to federal power to their pre-Regional Act contracts. 16 U.S.C. §839c(d)(1)(B). The Regional Act continued BPA's authority to make purchases for the industries to serve their first quartile load. 16 U.S.C. §849f(i)(1); *see* H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 56 (1980).

Before the Regional Act, service of nonfirm energy for the first quartile load of the industries provided reserves to protect BPA's firms loads.[14] The Regional Act requires that service to the industries' first quartile load continue to provide reserves to protect BPA's firm loads. 16 U.S.C. §839c(d)(1) (A); H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 34 (1980).

Petitioners assert that their purchase of nonfirm

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[13]J.A. 36 (67 percent service to the first quartile load plus full service to the other three quartiles equals 91.75 percent service for the total load); *See also* H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 62 (1980) ("During a 3½ year period (January, 1975 through June, 1978) BPA withheld almost 9 billion kilowatt hours of energy, which is equal to about 9 percent of the total planned DSI load for that period."). The specially-served industries contracts prior to the Regional Act were designed to provide power at a minimum of 85 percent of the time. *Draft EIS*, note 20 *supra*, Appendix A at II-46.

[14]*Port of Astoria v. Hodel*, 595 F.2d 467, 472 (9th Cir. 1979); *Final EIS*, note 22 *supra*, at IV-80. Petitioners assert, without citation, that prior to the Regional Act, service of nonfirm energy to the industries' first quartile load additionally provided a reserve to the publicly-owned utilities' needs for nonfirm energy. Pet. Br. 6, 11. Petitioners' assertion is incorrect. *See* pp. 21-23 *infra*.

energy results in "reduced rates for all customers." Pet. Br. 3; *see also id.* 4. BPA has concluded, however, that such sales do not reduce the cost of power to BPA's other customers."[15] Petitioners further assert that BPA has charged them a firm power rate for service of nonfirm energy. Pet. Br. 11. This assertion is incorrect and in fact, BPA often charges the industries less for nonfirm energy than the rate charged to publicly-owned customers.[16]

## V. BPA's Changing Interpretations

BPA originally informed both Congress and the public that the new regional legislation would not change the longstanding statutory priority of publicly-owned utilities. At the final public hearing on the proposed legislation, the BPA Administrator told Congress that the legislation, without "ambiguity or misunderstanding," retained BPA's mandate to give preference in all sales to the publicly-owned utilities. *See* p. 28 *infra.* In its final EIS, published at the same time as the passage of the Regional Act, BPA stated that under the legislation preference "would be preserved intact"; BPA did not mention any reversal in the priority to nonfirm energy. *See* pp. 26-27 *infra.*

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[15] *Final EIS*, note 22 *supra*, Attachment B, at B-29. BPA also concluded that it cost BPA "just as much, if not more" to serve the industries as it did to serve the publicly-owned utilities. *Id.*, at B-30.

[16] *See* J.A. 51-52. Also, in billing the industries, BPA melds the price for nonfirm energy used to serve the first quartile load with the price of the firm energy BPA is obligated to serve the other three quartiles. Finklea, note 10 *supra*, 951-52. As a result, all of the energy sold to the industries is sold at a single melded rate. Through this pricing system the specially-served industries obtain an advantage available to no other BPA customer. They can curtail service to their first quartile load without penalty, *see* J.A. 78, IX COR 2502 [§9(b)], and pay the lower melded rate for what is in actuality firm power service to the remaining three quartiles. The inequities in BPA's rate structures for the industries have been pointed out before. *Marketing Area of Bonneville Power Administration: Hearings on S. 1007, H.R. 994, H.R. 1160, H.R. 4071, and H.R. 4485 before Subcomm. on Irrigation and Reclamation of the House Comm. on Interior and Insular Affairs*, 88th Cong., 1st Sess. 134 (1963); W. Rodgers, *Corporate* Country 163-64 (1973).

After passage of the Regional Act, BPA reversed its position. At a meeting with the industries, a high-level BPA staff member said that the Act required a reversal in priority and that the specially-served industries had a priority to nonfirm energy.[11] However, shortly thereafter, counsel for BPA stated that the Regional Act did not control the allocation of nonfirm energy, and that the BPA Administrator had the discretion to reverse the priorities to nonfirm energy. Preference Customer Memorandum (9th Cir.), App. A, 4 (quoting statement of BPA counsel).

During the contract negotiations required by the Regional Act, BPA treated the priority to nonfirm energy for the specially-served industries as a nonnegotiable fact that would be embodied in the contracts to be offered to the industries.[12] A newly-appointed BPA Administrator then offered the contracts, stating that the Regional Act, by requiring in sections 5(d)(1)(A) and 3 (17) that the industries provide reserves, provided a "clear statutory basis" for the reversal in priority. J.A. 100. The Administrator described the increased service resulting from the reversal as "quasi-firm" service. *Id.*[13]

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[11] I COR 258. Other staff interpretations made during 1981 are set out in Appendix A to the Preference Customer Memorandum (9th Cir.).

[12] *E.g.*, XXII COR 6408. These publicly-owned utilities objected to BPA's actions. J.A. 114-17. Because the priority to nonfirm energy was nonnegotiable, petitioners' assertion that the contract negotiation process satisfies the federal requirements for a change in marketing policies is irrelevant. *See* Pet. Br. 18 n. 51, 50 n. 123.

[13] The Administrator also justified increased service to the industries by a reference which provided that the industries' historical service would continue: "[u]nder the Regional Act, the DSIs sought and achieved a significantly improved service: '. . . a quantity of power . . . based on the proportion of total industrial requirement, on a long-term average (currently estimated to be between 85 and 96 percent of the total DSI load)." J.A. 106. (ellipsis in original)

Petitioners believe that a priority to nonfirm energy means that the industries must be served "as if firm" ahead of all other needs for nonfirm energy.[40] BPA does not agree. In the contracts for the industrial purchasers, BPA provided that federal needs for nonfirm energy to displace federal resources must be met first before serving the industries. IX COR 2483 [§ 7(c)]. Petitioners and BPA have attempted to de-emphasize their dispute.[41]

## VI. The Case Below

The publicly-owned utilities filed suit in the Ninth Circuit to require BPA to follow its statutory mandate for priority to nonfirm energy.[42] The suit alleged that four sections in the contracts BPA offered the specially-served industries: (1) violated the publicly-owned utilities' recognized priority right to nonfirm energy; (2) exceeded the industries' entitlement to power established by the Regional Act; and (3) violated BPA power marketing procedures. All of the privately and publicly-owned utilities in the Northwest intervened and were aligned as plaintiffs.[43] The industries intervened as defendants.

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[40]XXV COR 6844-45; Brief for Respondents-Intervenors (9th Cir.) 43-44. Petitioners' logic could override nonpower uses of the Columbia River such as irrigation, recreation and fish protection. *See* Pet. Br. 40 n. 111.

[41]In the cover letter to its contract offer to the specially-served industries, BPA indicated that it would attempt to resolve the dispute at a later time. Petitioners supplied a copy of the letter in the Appendix to their Petition for Certiorari but omitted the paragraph discussing the dispute. *See* Pet. for Cert. App. M-1. The complete cover letter is reproduced as an Appendix to this brief.

[42]The suit also challenged the manner in which BPA shifted water in the hydroelectric project reservoirs to increase service to the first quartile load. That issue was resolved by settlement.

[43]This is not a dispute over nonfirm energy between publicly-owned and privately-owned utilities. *Cf. Alabama Power Co. v. FERC*, 685 F.2d 1311 (11th Cir. 1982), *cert. denied* _____ *U.S.* _____, *103s Ct. 3573 (1983)* (dispute over whether there is preference to public bodies in relicensing of hydroelectric projects under the Federal Power Act).

Chief Judge Browning and Judges Boochever and Wallace held that the Regional Act in unambiguous language reaffirmed the publicly-owned utilities' clear and longstanding statutory preference to nonfirm power. 686 F.2d at 711-13. The court carefully considered BPA's proposed interpretation, but concluded that it was unreasonable because it was contrary to the Act's preservation of preference and priority and could not be harmonized with other provisions. *Id.*

The court noted that nowhere in the legislation did Congress state explicitly that it was changing the priority to nonfirm energy. 686 F.2d at 713. The court examined the legislative history relied upon by BPA and found it ambiguous, especially compared to the clear legislative history supporting no reversal in priority. 686 F.2d at 713-14. The court concluded that if Congress had intended to reverse priorities, it would have used explicit language, not inference. 686 F.2d at 713.

The specially-served industries and BPA petitioned for a rehearing en banc and changed the emphasis of their arguments to different provisions of the Act. The Ninth Circuit denied the petition, but responded to some of the arguments in a new footnote to its opinion. *See* 686 F.2d at 712 n.4. The court found that the industries' entitlement was tied to and limited by their prior contracts which did not give them priority to nonfirm energy."

After the Ninth Circuit denied the petition for rehearing, BPA obtained a stay of the Ninth Circuit mandate by agreeing to operate its system so as to retain priority to nonfirm energy for the publicly-owned utilities in accordance with the opinion. BPA has maintained this

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"Because the Ninth Circuit invalidated the industry contracts on other grounds, the court concluded it was not necessary to determine whether BPA had violated its marketing policy procedures. 686 F.2d at 715 n. 10.

priority with no adverse impact on BPA revenues or operations."

BPA did not petition for certiorari.

## SUMMARY OF ARGUMENT

For over forty years, BPA has contracted with publicly-owned utilities to sell them nonfirm energy. During this time, BPA always made sales of nonfirm energy first to publicly-owned utilities and then to other BPA customers.

As petitioners and BPA recognize, the Regional Act preserves this preference and priority in a simple and straightforward manner. Section 5(a) provides that all sales of power by BPA are subject to the priority for publicly-owned utilities created by the Bonneville Project Act. Section 10(c) preserves intact the preference granted to publicly-owned utilities by the two other federal acts applicable to BPA power sales.

Petitioners and BPA argue that Congress impliedly reversed this express and longstanding priority and placed the 1,000 megawatt first quartile load of the specially-served industries ahead of the publicly-owned utilities. They support their arguments with a complex, convoluted reading of the Regional Act and its legislative history.

Petitioners and BPA argue that section 5(a) does not apply to all BPA power sales but is limited to sales of uncommitted power and that section 10(c) applies only to federal power sales outside the Pacific Northwest. These arguments contradict the plain language of the Regional Act and its voluminous legislative history.

Petitioners and BPA also argue that the Act requires that the industries receive a greater amount of nonfirm

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"*See* BPA *1982 Program and Financial Summary* 63 (1982).

energy. They argue that the Act by implication gives the industries a priority to nonfirm energy based on a provision that requires the industries to provide a portion of BPA's reserves for firm loads. They also argue that the Act decreased the reserves provided by nonfirm energy service to the first quartile load and by implication thereby increased the industries' entitlement. Their arguments ignore the facts and the language of the Act.

Requiring a customer to provide a reserve to BPA does not establish the amount of power BPA is to sell to the customer. Before a reserve is created, the customer must first be entitled to receive power. Only then does the curtailment of the right to be served create a reserve.

Petitioners and BPA are also incorrect because the Act limits the industries to an "amount of power equivalent" to that to which they were entitled before the Act. Further, Congress did not decrease the reserves provided by service to the industries' first quartile load, but intended that they be the same as before the Act.

Petitioners and BPA seek to limit longstanding preference and priority rights when the Act provides that nothing in the Act shall abridge or diminish such rights. They want an increased amount of power for the industries, when the Regional Act limits them to an equivalent amount of power.

## ARGUMENT

### I. THE REGIONAL ACT CONTINUES PREFERENCE AND PRIORITY TO FEDERAL POWER FOR PUBLICLY-OWNED UTILITIES

**There is only one provision in the Regional Act, section 5(a), that applies to *all* BPA sales of power under the Act. 16 U.S.C. §839c(a). This section is all-encompassing, requiring that any BPA sale of power is subject at all times to the preference and priority provisions of the Bonneville Project Act.**

The Regional Act in section 10(c) also expressly preserves the requirements of the Reclamation Act of 1939 and the Flood Control Act of 1944, that BPA give priority to publicly-owned utilities in the sale of nonfirm energy from federal hydroelectric projects. 16 U.S.C. § 839g(c). *See pp.* 1-2 *supra.*

The Ninth Circuit recognized these two preference directives and held that publicly-owned utilities have preference and priority to *all* nonfirm energy sold by BPA.

Petitioners and BPA attack that holding in three ways. First, they rewrite the history of BPA sales of nonfirm energy before the Act.[16] Petitioners and BPA argue that the industries had a first right to nonfirm energy under their pre-Regional Act contracts and that service of nonfirm energy to the publicly-owned utilities occurred only after a BPA interruption of the industries' right to service. Fed. Br. 26 n. 19; Pet. Br. 6, 12-13, 39. They fabricate this history in order to argue that the Regional Act decreased BPA's right to interrupt the industries and thereby granted the industries by implication a greater right to nonfirm energy.

Second, they argue that section 5(a) does not apply to *all* BPA power sales, but applies only through section 5(f) to any uncommitted power remaining after BPA makes sales of power under section 5(b), (c) and (d).[17] Third, they argue that the preservation of preference in section 10(c)

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[16]The court found that it was "undisputed" that prior to the Regional Act the preference and priority mandate of the Bonneville Project Act applied to nonfirm energy and that BPA had followed that mandate since 1937. 686 F.2d at 711. The court also found that it was "undisputed" that, prior to the Act because of statutory preference, BPA allocated and sold nonfirm energy to the publicly-owned utilities prior to selling nonfirm energy to the industries. 686 F.2d at 712 n. 4.

[17]Fed. Br. 24-25; Pet. Br. 24. The BPA Administrator did not mention section 5(f) in his decision offering the contracts at issue in this case. *See* X COR 2640-2899. Nor did BPA make this argument in its brief on the merits to the Ninth Circuit.

does not apply to the Pacific Northwest but applies only to power marketing statutes for other regions of the country."[48]

### A. Before the Regional Act, BPA Allocated and Sold Nonfirm Energy First to Publicly-Owned Utilities

Petitioners and BPA recognize that if the publicly-owned utilities had preference to nonfirm energy before the Regional Act, the reaffirmation of preference in the Act ends their case. To counter the Ninth Circuit's decision, they would rewrite the history of BPA's sales of nonfirm energy before the Regional Act. For straightforward statutory preference they substitute an intricate but inaccurate argument based on BPA's right to interrupt the industries to provide reserves. Fed. Br. 26 n. 19; Pet. Br. 6, 12-13.

The historical record and BPA's own practices and statements prepared before this litigation refute this new argument. As the Ninth Circuit found, BPA always allocated and sold nonfirm energy to publicly-owned utilities before it allocated and sold nonfirm energy to the industries. *See* p. 20n. 46 *supra*.

In 1980 BPA published a final environmental impact statement (EIS), describing its role in the Pacific Northwest Power Supply System."[49] The EIS stated that

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[48]Fed. Br. 25-26; Pet. Br. 26 n. 31. BPA's argument based on section 10(c) is not in the Administrator's decision offering the contracts involved in this case, or in BPA's brief on the merits to the Ninth Circuit. *See* X COR 2640-2899.

[49]Court orders in 1975 and 1977 directed BPA to prepare this EIS prior to any BPA involvement in then existing regional plans to build new electrical generating facilities and to market the power produced by those facilities. *See, Port of Astoria v. Hodel*, 8 E.R.C. (BNA) 1156 (D. Or. 1975), *aff'd*, 595 F.2d 467 (9th Cir. 1979); *Natural Resources Defense Council v. Hodel*, 435 F. Supp. 590 (D. Or. 1977), *aff'd sub nom. Natural Resources Defense Council v. Munro*, 626 F.2d 134 (9th Cir. 1980). BPA began the EIS in 1975, issued a draft EIS in 1977 and published a final EIS in December, 1980.

federal law required that BPA give "priority for federal power to public agencies and cooperatives within the region." *Final EIS*, note 22 *supra*, at IV-68.

BPA's priority in allocation was:

> firm capacity and energy and nonfirm energy first to preference customers and federal agencies in the Pacific Northwest region,
>
> remaining firm and nonfirm capacity and energy to direct-service industrial customers (DSIs) and Northwest investor-owned utilities . . . .

*Id.* at IV-68 to IV-69.

The EIS describes in detail how BPA sold nonfirm energy.[50] On the occasions when BPA had insufficient nonfirm energy to serve all of its customers' needs, BPA strictly followed the allocation priorities reflected in the EIS. For example, in 1971 BPA curtailed all nonfirm energy sales on October 18 because there was no nonfirm energy. BPA, *1971 Annual Report* 17 (1971). On November 1, BPA began selling nonfirm energy to the publicly-owned utilities and later, on November 18, to the privately-owned utilities and specially-served industries. *Id.; see also Final EIS*, note 22 *supra*, Attachment B, at B-34 to B-35. Further, when BPA had only limited supplies of nonfirm energy, BPA curtailed sales to all other customers before it curtailed sales to publicly-owned utilities.[51]

Before the Regional Act, BPA sold nonfirm power first to the publicly-owned utilities because preference required

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[50] *Final EIS*, note 22 *supra* at IV-71 (J.A. 29). These respondents quoted that description verbatim in every brief filed with the Ninth Circuit. *See* Memorandum in Support of Motion for Temporary Injunction (9th Cir.) 27; Preference Customer Memorandum (9th Cir.) 15; Preference Customer Reply Memorandum (9th Cir.) 12; Preference Customers' Response to Petition for Rehearing (9th Cir.) 5-6. Petitioners and BPA never questioned the allocation priority.

[51] BPA, *1970 Annual Report* 27 (1970). Under the petitioners' view of history, however, BPA must have interrupted the industries' right to purchase nonfirm energy, not only to serve publicly-owned utilities' needs, but also to serve privately-owned utility needs and even industry needs. In other words, service to the industries was interrupted to serve the industries.

it; the interruptible character of industry service was irrelevant to this priority.

### B. The Regional Act Reaffirms Preference and Priority to Nonfirm Energy for Publicly-Owned Utilities

Passage of the Regional Act in 1980 did not change the priorities to nonfirm energy. The Act both reaffirms and reinforces the preference and priority provisions of existing laws. Sections 5(a) and 10(c) of the Act, could not be any clearer: *All* power sales are subject to the preference and priority provisions of the Bonneville Project Act. *Nothing* in the Act alters or diminishes the preference clauses in the other federal laws controlling BPA's marketing of power.

Petitioners and BPA, however, now argue that "all" means "some" and that section 5(a) applies only to sales of power made under 5(f) after all sales are made pursuant to section 5(b), (c) and (d). Fed. Br. 24-25; Pet. Br. 24. They now also argue that section 10(c) applies only to federal laws governing the marketing of power by federal agencies outside the Pacific Northwest. Fed. Br. 25-26; Pet. Br. 26 n.31.

The answer to these arguments is the plain language of the Act. If petitioners and BPA were correct, section 5(a) would read:

> All power sales under this Act **[EXCEPT FOR POWER SALES UNDER SECTION 5(b), (c) AND (d)]** shall be subject at all times to the preference and priority provisions of the Bonneville Project Act of 1937 (16 U.S.C. 832 and following) and, in particular, sections 4 and 5 thereof.

16 U.S.C. §839c(a).

This reading of section 5(a) would make it redundant. Section 5(f) requires that power be marketed in accordance with the Bonneville Project Act, and thus ensures that preference and priority apply to sales of energy surplus to BPA obligations under section 5(b),(c) and (d). Petitioners

and BPA would assign that identical meaning to section 5(a), giving it no independent significance.

Their arguments also mean that section 10(c) would read:

> Nothing in this Act shall alter, diminish, abridge, or otherwise affect the provisions of other Federal laws [**EXCEPT FOR THE APPLICATION OF THOSE LAWS IN THE PACIFIC NORTHWEST**] by which public bodies and cooperatives are entitled to preference and priority in the sale of federally generated electric power.

16 U.S.C. §839g(c).

That reading is preposterous. BPA markets power from certain projects under the authority of the Bonneville Project Act, from other projects under the Flood Control Act of 1944 and from other projects under the Reclamation Act of 1939. *See* pp. 1-2, *supra; Draft EIS*, note 20 *supra*, Appendix A at I-18. Federal power agencies in other regions of the country also market power from hydroelectric projects under the same provisions of the latter two acts. Petitioners and BPA argue that Congress, without saying so, intended to amend those acts as they applied to the Pacific Northwest, leaving them unchanged as they applied to the rest of the country.[52]

A plain reading of section 5(a) and 10(c) resolves these inconsistencies. Preservation of preference and priority means that BPA must sell nonfirm energy from all federal hydroelectric projects to the publicly-owned utilities before the industries.

The legislative history, as well as the plain statutory language, rebuts the implausible argument that Congress intended to repeal *by implication* an express mandate of over forty years' standing.

In 1977 the Northwest congressional delegation introduced identical bills in the House and Senate dealing

[52]See also H.R. Rep. No. 976, Part II, 96th Cong., 2d Sess. 57 (1980) which shows that section 10(c) applies to all laws except the Bonneville Project Act without geographic limitation.

with BPA and the Pacific Northwest power supply system. S. 2080 and H.R. 9020, 95th Cong., 1st Sess. (1977). The bills made no mention of preference for sales to publicly-owned utilities and were characterized by many as a weakening of preference.[13]

In 1978 the Northwest delegation submitted new proposed regional power legislation which was designed to leave the preference rights of publicly-owned utilities unchanged.[14] These bills contained provisions authorizing sales of power by BPA to public bodies, privately-owned utilities and industries that were similar to section 5(b), (c) and (d) of the Regional Act and a surplus sales provision substantially similar to section 5(f) in the Regional Act.[15] However, they did not contain any provisions expressly protecting preference.

At the first hearings on the bills, representatives of the publicly-owned utilities testified that they understood that the intent of the bills was to preserve preference but that the bills did not carry out that intent.[16] A spokesman for the American Public Power Association explained that the proposed legislation conflicted with preference and priority because the section analogous to section 5(f) of the Regional Act:

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[13] *E.g., Pacific Northwest Electric Power Supply and Conservation: Hearings on H.R. 9020, 9664 and 5862 Before the Subcomm. on Water and Power Resources of the House Comm. on Interior and Insular Affairs*, Pt. V, 95th Cong., 1st Sess., 57 (1977) (remarks of Executive Director, Washington Public Utility Districts' Association).

[14] *Pacific Northwest Electric Power Supply and Conservation Act: Hearings on S. 2080 and S. 3418 Before the Senate Comm. on Energy and Natural Resources*, 95th Cong., 2d Sess. 816 (Senator Jackson), 872 (BPA Administrator) (1978).

[15] *Hearings on S. 2080 and S. 3418*, note 54 *supra*, 822-24 (section 5(a), (b), (c) and (d)).

[16] *Hearings on S. 2080 and S. 3418*, note 54 *supra*, 1054 (Washington Public Utility Districts' Association), 1058, 1064 (Snohomish County Public Utility District), 1068-69 (American Public Power Association), 1079 (Public Power Council), 1103-04 (National Rural Electric Cooperative Association), 1112 (Eugene Water and Electric Board).

> subordinates the preference provisions of the Bonneville Project Act to new rights created for private power companies and direct service industries. This is done by asserting that the Bonneville Project Act — and any other existing law related to BPA's marketing of federal power — applies to electric power which is surplus to obligations imposed by sections 5(a), (b) and (c) of S. 3418.

*Hearings on S. 2080 and S. 3418, note 54 supra,* 1069.

He said that the legislation should be amended "to state that all BPA sales are subject first to the preference provisions of the Bonneville Project Act." *Id.* Senator Jackson promised that the necessary amendments would be added to protect preference and priority. *Id.* 1062.

The 95th Congress adjourned prior to completion of consideration of the bills.[11] In the 96th Congress, Senator Jackson reintroduced the proposed legislation as S. 885.[12] At the same time, Senator Jackson introduced amendments which were designed to protect fully preference and priority. 125 Cong. Rec. S3997-99 (daily ed. Apr. 5, 1979). After minor modifications, the Senate adopted two of those amendments which were nearly the same as the preference provisons in the Regional Act, sections 5 and 10(d), S. 885.

Although the language of the two provisions is straightforward, the Senate Report prepared for S. 885 emphasizes that preference and priority applied to all BPA power sales. S. Rep. No. 272, 96 Cong., 1st Sess. 15, 20, 21, 26 [corrected by 125 Cong. Rec. S 11593 (daily ed. Aug. 3, 1979)], 35 (1979).

BPA prepared an analysis of S. 885 as part of its final EIS in December of 1980. *See Final EIS,* note 22 *supra,* at

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[11] S. Rep. No. 272, 96th Cong., 1st Sess. 19 (1979).

[12] S. Rep. No. 272, 96th Cong., 1st Sess. 4, 14 (1979).

I-33 to I-37. BPA concluded that among the most significant elements of S. 885 (which it discussed as Alternative 3) was: "Preference and priority for public bodies and cooperatives in the sale of Federal power would be preserved intact." *Id.* at I-36. BPA also stated that under S. 885: "public bodies and cooperatives would retain their statutory preference to Federal power."[59]

BPA, in its draft EIS issued in 1977, had presented alternatives it considered reasonable to its marketing plans for power. *See Draft EIS*, note 20 *supra*, Appendix C, Chapter III. It noted that federal law requires that available nonfirm energy first be offered to preference customers, and listed three possible allocation methods based on type of customer, noting that many of the allocation methods would require a change in the Bonneville Project Act. *Id.* at III-29 to III-30. The third alternative would have granted the industries a priority to nonfirm energy.[60]

By December of 1980, BPA no longer believed that the third alternative was reasonable, and omitted the

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[59] *Id.*, at III-53; *see also id.* at IV-334. The EIS describes service of nonfirm energy to the industries as "continued" service, not increased service. *Id.*, at IV-336. If as BPA states it was "intimately involved in the legislative process" and "made major contributions to Congress' consideration of the statute" (Fed. Br. 17, 21), it is inexplicable that the EIS makes no mention of increased service of nonfirm energy to the industries or a reversal of priority to nonfirm energy. In the discussion of nonfirm energy sales under S. 885, there is no mention of a change in priority. *See id.*, at IV-336.

[60] "A third allocation method would provide that industries have priority, subject to utility requirements for secondary energy to serve firm loads, for a fixed quantity of secondary energy which the industries would use to serve their interruptible loads. Only energy in excess of this secondary energy would be available to preference customers and investor-owned utilities pursuant to one of the methods described above for displacement of their thermal resources." *Id.*, at III-30.

alternative from the Final EIS.[41] The clarity of that abandoned alternative is in marked contrast to the inferences and convoluted reasoning used by petitioners and BPA to argue that the Regional Act grants the industries a priority to nonfirm energy.

After the Senate passed S.885, two committees in the House considered the bill (along with revisions of S.885). At the final hearings, the BPA Administrator again made it clear that publicly-owned utilities were to retain first call on all federal power, both firm and nonfirm:

> We do sell, of course, surplus power after, and only after, the requirements of our preference customers have been met. We do not advocate that that be changed. The legislation before you, I believe, does not advocate that the preference clause be abrogated.
>
> . . .
>
> The legislation, I think the intent of it is to retain the preference clause, to assure that the preference customers of the Bonneville Power Administration will continue to have and will always have first call on the Federal-based system resources. Any effort that you or anyone else will make to assure that, I want to support, Mr. Ottinger, I think that is what is being attempted.

*Pacific Northwest Electric Power Planning: Hearing on H.R. 3508 and H.R. 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 251 (1979).

> I do not advocate the preference customers losing their preference. The legislation, specifically section 5(a) assuring the priority of the preference customers in access to the Federal-based system resource, I think specifically, in an effort to make sure there is no ambiguity or misunderstanding on that point, the legislation before you specifically

[41] *See Final EIS*, note 22 *supra*, at IV-335 to IV 336. Rules applicable to federal environmental impact statements require that final statements "[r]igorously explore and objectively evaluate all reasonable alternatives." 40 C.F.R. §1502.14(a) (1982); *see also* 42 U.S.C. §4332 (2)(c) (1976).

reiterates a commitment to the exisiting preference clause in the Bonneville Project Act.[62]

Later, the House substituted for S. 885 a bill which became the Regional Act. The two House reports for the Regional Act overwhelmingly emphasize that preference and priority to all BPA power under all federal marketing statutes is preserved for publicly-owned utilities. The House Committee of Interior and Insular Affairs committed in its report not "to interfere in any way with, or modify, the statutory rights of preference customers either within or without the region." H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 26 (1980); *see also id.* 34, 36, 57. The House Committee on Interstate and Foreign Commerce expressed its intent to protect preference and not "to undo nearly 80 years of history or establish any precedent." H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 34 (1980); *see also id.* 24, 27, 33-35, 59, 74.

Congress intended to "assure," "fully preserve," "expressly preserve," "protect," "ensure," "retain," and "guarantee" the preference of publicly-owned utilities to all Bonneville power, both firm and nonfirm.[63]

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[62] *Id.* 254-55; *see also id.* 252. The attorney for the industries (also one of the authors of the petitioners' brief) was present at the morning hearings when the Administrator testified, and later the attorney testified in the afternoon session but did not state that the Administrator was wrong or that priority to nonfirm energy had been reversed. *Pacific Northwest Electric Power Planning: Hearings on H.R. 3508 and H.R. 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 310-423 (1979) (testimony of E. Redman). The attorney specifically discussed the purchase of nonfirm energy by Seattle City Light, a public preference utility. *Id.* 416.

[63] As an example, Representative Lujan stated during debate on the bill that became the Regional Act: "The bill fully protects the preference clause of the Bonneville Project Act of 1937, thus assuring the publicly-owned utilities and other preference customers their full share of power." 126 Cong. Rec. H9845 (daily ed. Sept. 29, 1980). He also stated: "This bill provides a mechanism for making those allocations in an orderly fashion according to priorities which place the preference customers at the head of the line." *Id.*

Virtually every other member of Congress actively involved with the legislation stated a belief that preference was protected in the Act. *See* 125 Cong. Rec. H2061 (daily ed. Mar. 11, 1979) (Rep. Swift); *Pacific*

Giving full effect to the reaffirmation of preference and priority in the Regional Act as required by plain statutory language and legislative history, is consistent with the other provisions of the Act. It does not "paralyze" the remainder of the Regional Act as BPA argues. *See* Fed. Br. 24. It means that publicly-owned utilities have first call on BPA firm and nonfirm energy. Additionally, Congress gave BPA both the authority and the obligation to acquire sufficient resources to perform the new contracts provided for in section 5(b), (c) and (d).[64]

As Senator Hatfield noted in his final remarks on the bill that became the Regional Act: "The purchase authority given to BPA provides it a means of providing power to the direct-service industries without offending the principles of 'preference.'"[65] The Regional Act as a whole and its legislative history are in harmony.

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*Northwest Electric Power Planning and Conservation Act: Hearings on S. 885 Before the Senate Comm. on Energy and Natural Resources*, 96th Cong., 1st Sess. 67 (1979) (Sen. Melcher); 125 Cong. Rec. S11593 (daily ed. Aug. 3, 1979) (Sen. Hatfield); 125 Cong. Rec. S3999 (daily ed. Apr. 5, 1979) (Sen. Jackson); *Pacific Northwest Electric Power Planning: Hearings on H.R. 3508 and 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 67 (1979) (Rep. Foley); 126 Cong. Rec. E1169 (daily ed. Sept. 29, 1980) (Rep. Clausen); *id.* H9848 (Rep. Dingell); *id.* H9849 (Rep. Moorhead); *id.* H9850-52 (Rep. Swift); *id.* H9855 (Rep. Symms); *id.* H9860 (Rep. Gore); *id.* H9862 (Rep. Duncan); 126 Cong. Rec. H10675 (daily ed. Nov. 17, 1980) (Rep. Lujan); *id.* H10677 (Rep. Brown); *id.* H10678 (Rep. Foley); *id.* H10679 (Rep. Swift); *id.* 126 Cong. Rec. S14693 (daily ed. Nov. 19, 1980) (Sen. Hatfield).

No member of Congress ever stated that the priority to nonfirm energy would be changed.

[64] 16 U.S.C. §839d(a)(2). Senator Jackson in remarks before the Senate concluded that "the authority for BPA to acquire from non-Federal entities additional electric power resources, including conservation, to meet the electric needs of Northwest consumers" was the "heart" of the Act. 126 Cong. Rec. S14690 (daily ed. Nov. 19, 1980). To help ease the deficit in power, the bill also provided incentives for utilities to conserve electricity and to build resources, to sell to BPA or to serve their own loads. 16 U.S.C. §839d (d), (f), (h).

[65] 126 Cong. Rec. S14693 (daily ed. Nov. 19, 1980). Senator Hatfield also stated: "In turn, BPA can sell power to the DSI's only because of purchase authority which is, then, the essential link to achieving rate parity in the region." *Id.* S14694.

## II. THE REGIONAL ACT LIMITS THE INDUSTRIES TO AN AMOUNT OF POWER EQUIVALENT TO THAT ALLOWED UNDER THEIR EXPIRING CONTRACTS

The Regional Act authorized BPA to continue to serve the industries. Congress gave BPA authority to acquire additional resources. However, Congress carefully crafted the Regional Act to limit BPA service to the industries to the same service they had received before the Act and to require that the industries continue to provide BPA with reserves for firm loads.

Petitioners and BPA now argue that the Act mandates that the industries receive increased nonfirm energy service and provide decreased reserves.[16]

Petitioners and BPA strain to avoid admitting that their arguments mean that the industries receive an amount of power greater than that authorized by their expiring contracts. They use euphemisms such as "quasi-firm," "improved power quality" and "improved terms of power sale" for what is in fact a greater amount of power.[17]

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[16]Petitioners capsulize the argument: "By limiting to the protection of BPA's firm loads the purposes for which first quartile power may be restricted, Congress changed the DSI's power commitment from their 1975 contracts, under which first quartile power could be restricted 'at any time'." Pet. Br. 22.

[17]*See* Fed. Br. 14, 18-19. Petitioners previously characterized service of energy to the first quartile load as "a junior firm' type of power." BPA, *Administrator's Record of Decision, 1981 Transmission Rate Proposal and 1981 Wholesale Power Rate Proposal, IV-14 (June, 1981).*

BPA has admitted that the industries receive an increased quantity of power. J.A. 100 (the first quartile is "served by operating resources to provide a power quantity with firm characteristics . . ."), 106 ("the DSIs sought and achieved a significantly improved service: '. . . a quantity of power . . .' ").

### A. Section 5(d) (1) (B) — The Industries Are Limited to an Amount of Firm and Nonfirm Power Equivalent to the Entitlement under Their 1975 Industrial firm Power Contracts

Section 5 (d) (1) (B) of the Regional Act limits the petitioners to: "*an amount of power equivalent to that to which such customer is entitled under its contract dated January or April 1975 providing for the sale of 'Industrial Firm Power.'*" 16 U.S.C. §839c(d) (1)(B). [Emphasis added]

Under this provision, the Regional Act gives the industries no greater rights than they had before the Regional Act, when BPA sold nonfirm energy first to the publicly-owned utilities and then equally to the privately-owned utilities and the industries. If BPA changes the priority to nonfirm energy, the increased availability of nonfirm energy for the industries violates the Regional Act's limitation.

The Ninth Circuit followed the plain meaning of section 5(d) (1) (B). The court concluded that the section did not entitle the industries to a priority to nonfirm energy because the section linked the industries to their 1975 contracts and because under those contracts the industries received nonfirm energy only after the publicly-owned utilities. 686 F.2d at 712 n. 4.

Petitioners and BPA ignore the plain language of section 5(d) (1) (B) and assert that the section's sole purpose is to authorize the industries to purchase an amount of power sufficient to serve, on a 100 percent firm basis, the full loads set forth in their 1975 contracts."

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"Fed. Br. 28-30; Pet. Br. 24. BPA's support for its argument is truly imaginative; it argues that Congress intended to grant to the industries the full load requirements expressed in their 1975 contracts because an early version of the legislation (H.R. 13931) authorized BPA to meet the industries' "load requirements" without mention of the 1975 contracts. *See* Fed. Br. 28-30. The simple answer to BPA's argument is that Congress said "requirements" when it wanted to provide for requirements and did not do so in section 5(d)(1)(B). *See* 16 U.S.C. §839c(e)(1). A second answer is provided by what "load requirements"

They cite only an "amount of power" in section 5(d) (1) (B), thus, making the term "equivalent" and the specific reference to the 1975 contracts "providing for the sale of 'Industrial Firm Power'" inconsequential.[69]

Petitioners and BPA are incorrect. All of the language in section 5(d) (1) (B) must be given meaning. By tying service to the industries to the equivalent amount of power under the 1975 contracts providing for Industrial Firm Power, section 5(d) (1) (B) of the Regional Act preserves the pre-Act priorities to nonfirm energy."[70]

Congress referred to "Industrial Firm Power" in section 5(d) (1) (B) because the phrase has a specific meaning. The phrase is defined in the 1975 contracts to mean that BPA can restrict nonfirm service to the first

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meant in H.R. 13931. An attorney for the industries (and one of the authors of petitioners' brief) testified that H.R. 13931 required:

> the DSI's to trade in their existing contracts for low-cost power, contracts which have on the average another 8 or 9 years to run, in exchange for new contracts with dramatically higher costs and reduced firm power.
>
> The only benefit the DSI's receive is the assurance of new long-term contracts which will permit them to plan their future operations and investments.

*Pacific Northwest Electric Power Issues: Hearings on H.R. 13931 Before the Subcomm. of Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 95th Cong., 2d Sess. 254 (1978) (testimony of E. Redman).

[69] *See* Fed. Br. 23, 29; Pet. Br. 24, 25, 39. BPA has conceded elsewhere that section 5(d)(1)(B) refers to more than "amount of power." It has relied on that section to require that the second quartile load of the industries have no greater restrictions than existed before the Act. J.A. 96.

[70] Congress was concerned that sales of power to the industries not increase over the pre-Act amounts. In section 5(d)(3) Congress prohibited BPA from selling "amounts of electric power, including reserves, to existing direct service industrial customers in excess of the amount permitted" under the pre-Act contracts unless the Administrator and the Pacific Northwest Electric Power and Conservation Planning Council made certain findings. 16 U.S.C. §839c(d)(3). BPA and the Council have not made the findings required by section 5(d)(3).

quartile load at any time, without limitation."[11] Thus, if nonfirm energy is not available, BPA does not serve the first quartile load with nonfirm energy.

The concept of equivalent amount of power is used elsewhere in the Regional Act in a way which refutes the arguments of petitioners and BPA. The Act provides that the Administrator shall purchase power from the privately-owned utilities and offer "in exchange, to sell an equivalent amount of electric power to such utility." 16 U.S.C. §839c(c) (1). The amount of this exchange varies with the loads of the utility so that the amount of power exchanged is always equivalent.[12] The amount is not a fixed, unchanging amount.

BPA's attempt to grant a priority to nonfirm energy to the industries violates section 5(d) (1) (B).

### B. Section 5(d)(1)(A) and 3(17) — The Industries' Provision of Reserves for Firm Loads Does Not Create a Priority to Nonfirm Energy

Section 5(d) (1) (A) of the Regional Act provides that sales of power to the industries "shall provide a portion of

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[11]Under the 1975 contracts, the Administrator made "Industrial Firm Power (as defined in section 1.4 of Exhibit B)" available for purchase by his industrial purchasers. Pet. for Cert. App. N-2 §4(a). The 1975 contracts define Industrial Firm Power as power that BPA will make continuously available unless restricted by BPA. J.A. 112 [§1.4]. BPA could restrict deliveries of energy to the first quartile load "at any time" without limitation. XXIII COR 6305 [§8].

Thus, the amount of nonfirm power supplied by BPA under the 1975 contracts for the first quartile load was subject to nondelivery or restriction at any time that nonfirm power was not available. *See* J.A. 43; *see also Port of Astoria v. Hodel*, 595 F.2d 467, 472 (9th Cir. 1979) (Industrial Firm Power "denotes a new method or structure for distributing power to industry.").

[12]16 U.S.C. §839c(c)(2); H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 59, 60-61 (1980); H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 35 (1980). BPA has incorporated this concept in the contracts it recently offered. IX COR 2541-42 [§5], 2545 [Ex. D. §1].

the Administrator's reserves for firm power loads within the region." 16 U.S.C. §839c(d) (1) (A). Section 3(17) provides that reserves are created by BPA's right to interrupt service to certain customers in order to serve its firm power customers. 16 U.S.C. §839a(17).

Petitioners and BPA argue that sections 5(d) (1) (A) and 3(17), which make no mention of entitlement to power, imply a right for the industries to be served nonfirm energy ahead of the publicly-owned utilities.[13] Further, they argue that BPA's right to interrupt sales of nonfirm energy to the industries, a right BPA has with all nonfirm customers, establishes the industries' entitlement to nonfirm energy. Fed. Br. 19, 26; Pet. Br. 6, 22, 25-26.

Entitlement creates reserves, not vice versa. Service to the industries is required only if the industries are entitled to power. Service is not required simply because the industries provide reserves whenever they are entitled to be served. The industries are not entitled to nonfirm energy if there is none available. Only when there is nonfirm energy available and they are entitled to the energy are reserves created.

Petitioners' and BPA's arguments are based on two incorrect assumptions. The first is that the Regional Act changed the reserves the first quartile load provides. However, no change in reserves occurred. In its final EIS, BPA described the reserves that service of nonfirm energy to the first quartile load provides:

> This quartile is served from secondary energy available only on an intermittent basis and is frequently interrupted. When prudent operation dictates the top quartile of the IF load be interrupted *to ensure service to BPA firm loads,* BPA will frequently make available Advance Energy."[14]

[13] BPA relied solely on these two sections as the "clear statutory basis" for granting the DSIs a priority to nonfirm energy in its Record of Decision offering the contracts and in its brief on the merits to the Ninth Circuit. *See* J.A. 101; Br. Fed. Resp. (9th Cir.) 19-25.

[14] J.A. 31 [Emphasis added]; *see also Port of Astoria v. Hodel,* 595 F.2d 467, 471-72 (9th Cir. 1979); VIII COR 2338-39.

Congress in passing the Act clearly understood that the reserves provided by service to the first quartile load remained the same. The House Report states that the first quartile load would be interrupted "in order to protect the Administrator's firm loads within the region at any time and for any period, as determined by BPA." H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 62 (1980).

Nowhere is there an indication in the legislative history that Congress believed it was decreasing the reserves provided by the industries.

The second incorrect assumption is that only the sale of nonfirm energy to the industries can provide reserves. The sale of nonfirm energy to any customer provides reserves. *See* p. 10 *supra*. The Regional Act is in agreement by providing that sales of power to the industries "shall provide a portion of the Administrator's reserves." 16 U.S.C. §839c(d) (1) (A).

Petitioners' and BPA's arguments fail for three independent reasons: (1) the provision of reserves does not mandate what sales must be made; (2) sales of nonfirm energy to any customer provide a reserve; and, (3) the Regional Act does not change the type of reserves which sales to the first quartile load provide.

### C. The Legislative History Cited By Petitioners and BPA Does Not Support a Priority to Nonfirm Energy for the Industries

The Ninth Circuit examined the legislative history cited by BPA and the industries to support a reversal of priority to nonfirm energy and concluded that the legislative history did not provide the claimed support. 686 F.2d at 713-14.

Petitioners and BPA cite again essentially the same sections of the legislative history they cited to the Ninth

Circuit."[75] These sections do not state that Congress intended to grant a priority to nonfirm energy to the industries or that Congress intended that a 1,000 megawatt load be placed ahead of the publicly-owned utilities' needs for nonfirm energy or even that Congress intended to give the industries more nonfirm energy.[76]

The most detailed section of legislative history cited by petitioners and BPA is in Appendix B to the Senate Report for S.885.[77] Appendix B was an illustrative numerical analysis of the estimated BPA wholesale power rates under S.885.

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[75]BPA for the first time cites testimony from hearings held on H.R. 9020 in late 1977 to support increased service to the industries. Fed. Br. 30. As pointed out by BPA elsewhere in its brief, H.R. 9020 proposed to allocate a specific number of megawatts to the industries and did not pass. Fed. Br. 28.

[76]Congressional omission of such a statement is illogical in light of BPA's contention that "Congress was fully cognizant that the 1980 Act would modify the quality of power whose allocation would be governed by preference rights in the region." Fed. Br. 25. The absence of a clear statutory statement and a clear statement in the legislative history is significant:

> Courts in the past have been able to rely upon legislative history for important insights into congressional intent. Without implying that this is no longer the case, we note that interest groups who fail to persuade a majority of the Congress to accept particular statutory language often are able to have inserted in the legislative history of the statute statements favorable to their position, in the hope that they can persuade a court to construe the statutory language in light of these statements. This development underscores the importance of following unambiguous statutory language absent clear contrary evidence of legislative intent.

*National Small Shipments Traffic Conference, Inc. v. Civil Aeronautics Board*, 618 F.2d 819, 828 (D.C. Cir. 1980); *see also United Airlines, Inc. v. Civil Aeronautics board*, 569 F.2d 640, 647 (D.C. Cir. 1977); Redman, *The Dance of Legislation*, 119-20 (1973).

There are numerous sections in the committee reports for the Regional Act not cited by BPA and the petitioners that discuss service to the loads of the industries and make no mention of increased service or an industry priority to nonfirm energy. H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 34 (1980); H.R. Rep. No. 976, Pt. I, 96th Cong., 2d Sess. 28-29, 36, 61-62 (1980); see also S. Rep. No. 272, 96th Cong., 1st Sess. 15, 28 (1979).

[77]Fed. Br. 33; Pet. Br. 32. BPA's use of Appendix B is ironic since BPA's counsel has previously disparaged its usefulness:

S. Rep. No. 272, 96th Cong., 1st Sess. 56 (1979). The Appendix provided a short discussion of parts of the bill. The discussion uses a 55 percent service to the first quartile load of the industries under the bill *which reflects their historial availability of service. See id.* 67.

Petitioners and BPA base their "mandate" for a reversal in the priority to nonfirm energy on the following statement in Appendix B:

> The quantity of power for rate purposes is based on the proportion of the total industrial requirement, on a long-term average (currently estimated to be between [1] *85 percent and 96 percent of the total DSI load),* that BPA projects it will be able to serve directly. This projected availability is predicated on the continued planning and development of 'firm' resources under critical streamflow conditions to carry 75 percent of the total DSI requirements. The balance would be served with [2] *resources which are in excess of critical planning amounts* but [3] *operated to meet the entire DSI Load as if it were firm. The operation of the System to carry out this purpose results from treating as a firm load the maximum amount of the DSI Load (not all of which can be covered under critical streamflow planning), to the extent that this maximum load can be met in the initial period of the PNW Coordination Agreement Critical Period while protecting firm loads against the worst historical streamflow* and maintaining an ability to restrict an equivalent amount of the DSI Loads. S. Rep. No. 272, 96th Cong., 1st Sess. 59 (1979). [Emphasis and bracketed numbers added.]

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The use of Appendix B is cast in doubt by the general rule of statutory construction that the proper function of legislative history is to solve and not create an ambiguity. As read against the words of the Act and the entire remainder of the legislative history, Appendix B alone creates the ambiguity. The continuing vitality of the numerical analysis of Appendix B of the Senate Report is also cast in doubt by the fact that it was never incorporated or referred to in the House Commerce and House Interior Reports. Preference Customer Memorandum (9th Cir.) Ex. D-5. (quoting BPA brief from 1981 Wholesale Rate Proceeding) [Footnote and citations omitted.]

This quotation does not provide for increased service of nonfirm energy to the first quartile load. Rather, it provides for a continuation of past BPA service to the industries.

First, part [1] anticipates a continuance of BPA's historic service of 85 percent to 96 percent of the industries' total loads.[18]

Second, part [2] states that the first quartile load will be "served with resources which are in excess of critical planning amounts," i.e., nonfirm energy. This service is again a continuation of prior service to the first quartile load with nonfirm energy.

Finally, part [3] states that BPA will operate its resources:

> to meet the entire DSI Load as if it were firm [by] . . . treating as a firm load the maximum amount of the DSI load . . . to the extent that this maximum load can be met in the intitial period of the PNW Coordination Agreement Critical Period while protecting against the worst historical streamflow.

This direction is based on a belief that the first quartile should be treated as a "firm load" for purposes of BPA operation under the Pacific Northwest Coordination Agreement so that BPA can shift the Firm Energy Load Carrying Capability of the Coordinated System to serve the first quartile load. This is the "shift" service described at p. 12 *supra*. Again, this direction says nothing about an increased service of nonfirm energy to the first quartile load.[19]

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[18] Petitioners conveniently drop the 85 percent and conclude that "Congress expressly adopted this plan to assure the industries an increased average power availability (96%)." Pet. Br. 34; *see also id.* 9 n.15.

[19] *See* 686 F.2d at 713-14 & n.7; J.A. 50. These respondents explained page 59 of the Senate Report to the Ninth Circuit. Preference Customer Memorandum (9th Cir.) 22-26; Preference Customer Reply Memorandum (9th Cir.) 20. BPA has never refuted this explanation. Petitioners argue that page 59 of the Senate Report requires that BPA operate its system

The other two sections of legislative history upon which petitioners and BPA rely define the reserves provided by service to the industries and do not establish an industry priority to nonfirm energy. H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 48 (1980).[80]; S. Rep. No. 272, 96th Cong., 1st Sess. 28 (1979).[81]

None of these sections of legislative history reflect the "unmistakable precision" that BPA contends is present or the "highly specific understanding"[82] that BPA contends

to carry the first quartile load as a firm load by giving it a priority to nonfirm energy. Pet. Br. 40 n.111. Petitioners' argument creates an additional firm load for BPA in contradiction of Congress' intent that there "be no increase in firm power commitments" for the industries. S. Rep. No. 272, 96th Cong., 1st Sess. 28 (1979).

[80]*See* Fed. Br. 34; Pet. Br. 30. Because of their use of ellipses, petitioners' quotation from the House Report is misleading. This part of the legislative history also provides that the industries are to "continue to provide" reserves and that "no additional BPA sales to existing DSIs are authorized" beyond their entitlement under the 1975 contracts. The legislative history also states here that "[a]pproximately 25 percent of the DSI load is to be treated as a firm load for purposes of resource operation" indicating an intent that the first quartile load may be treated as a "firm load" for purposes of the Pacific Northwest Coordination Agreement so that BPA can shift water to serve it. *See p. 39, supra.*

[81]Fed. Br. 25, 32; Pet. Br. 28.

[82]*See* Fed. Br. 20, 35. BPA contends that it informed Congress by letter in August of 1980 about the reserves that the industries would provide and that because the House Interior Committee included this statement in its report (H.R. Rep. No. 976, Pt. II, 96th Cong., 2d Sess. 48 (1980)), Congress understood how the industries' first quartile load was to be served. *See* Fed. Br. 8 n.10. This contention is incorrect. First, reserves do not create entitlement. Second, the letter makes no mention that the industries are to receive a priority to nonfirm energy or an increased service of nonfirm energy. Third, the letter, in describing how the value of industry reserves is to be calculated, states: The average megawatts of regional reserves being provided are normally considered to be one-half the DSI load. A more precise estimate is determined by taking one quartile of the DSI load plus whatever portion of the top quartile is assumed to be available in the given year." VIII COR 2345.

This quotation admits that the entire first quartile load of the industries does not provide a reserve but only the portion that can be served by *available* power. BPA argues, however, that under section 5(d)(1)(B) the first quartile load is entitled to 100 percent service and that, therefore, the entire first quartile load provides a reserve. The

occurred regarding service of nonfirm energy to the first quartile load of the industries.[11] Provisions of legislative history affirming preference and priority for public bodies to all power abound; provisions of legislative history reversing that priority and increasing nonfirm energy service to the industries are nonexistent.

## III. AFTER GIVING BPA'S POSITION EVEN GREATER DEFERENCE THAN THIS COURT'S DECISIONS REQUIRE, THE NINTH CIRCUIT CORRECTLY CONCLUDED THAT BPA'S PROPOSED INTERPRETATION OF THE REGIONAL ACT IS UNREASONABLE

Petitioners and BPA make much of what they call the Ninth Circuit's failure to give "appropriate deference" to BPA's construction of the Regional Act.[12] That construction, however, received all the consideration to which it was entitled, and more. The Ninth Circuit adopted petitioners' and BPA's position that BPA's construction

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quotation provides a simple answer to BPA's argument; if nonfirm energy is not available because of low water or publicly-owned utility priority, the first quartile load is not entitled to be served.

[11]The understanding of counsel for the industries regarding service to the industries was stated during the final public hearings on the Regional Act:

> Planning certainty has value; it's worth paying for. Under this legislation, the price of a reasonable degree of planning certainty for the DSI's is the surrender of their existing low-cost power contracts in exchange for new contracts with dramatically higher rates and *substantially lower power quality*. Other regional consumers would not have to pay higher rates or accept lower quality power as a result of this legislation, but they do need and will benefit from planning certainty just as the DSI's will.

*Pacific Northwest Electric Power Planning: Hearings on H.R. 3508 and 4159 Before the Subcomm. on Energy and Power of the House Comm. on Interstate and Foreign Commerce*, 96th Cong., 1st Sess. 311 (1979) (testimony of Eric Redman). [Emphasis added]

[12]Both complain because the Ninth Circuit did not accept BPA's *present* construction of the Act. They ignore the fact that BPA's construction of the relevant portions of this legislation has changed over time (see pp. 14-15 *supra*), and they offer no reasons why the Court should give more deference to BPA's present construction of the Act than to any of its previous positions.

was entitled to substantial deference and even to "additional weight" because BPA had participated in drafting the legislation.[9] The court also expressly limited its review to whether BPA's interpretation was reasonable.[10]

The Ninth Circuit thus employed a more limited scope of review than that recently employed by this court. *See Public Service Commission of the State of New York v. Mid-Louisiana Gas Co.*, _____ U.S. _____, 51 U.S.L.W. 5030 (1983). In that case, although the Court agreed with the general proposition that the agency's interpretation of the statute was entitled to "substantial deference," it gave that deference in the form of "careful consideration" of the agency's arguments. Those arguments were not persuasive, and the Court construed the statute according to the Congressional intent revealed by the statutory language itself and by the legislative history.[11]

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[9]The publicly-owned utilities were equally involved in the drafting process. 125 Cong. Rec. S 3998-99 (daily ed. Apr. 5, 1979) (Sen. Jackson); 126 Cong. Rec. H 9848 (daily ed. Sept. 29, 1980) (Rep. Dingell); 125 Cong. Rec. S 11592 (daily ed. Aug. 3, 1979) (Sen. Hatfield).

[10]686 F.2d at 710-11. BPA's proposed construction, as the Ninth Circuit pointed out, was based on flawed reasoning, 686 F.2d at 712, would conflict with the Act's clear preference provisions, 686 F.2d at 713, relied on indirect statutory references and multiple inferences to create a significant exception to the direct preference provisions, 686 F.2d at 713-14, and would contravene the purpose of the preference clause. 686 F.2d at 715. Although the court believed that some support for BPA's interpretation could be found in the legislative history, that purported support was itself ambiguous. 686 F.2d at 713 n. 7. The legislative history supporting the court's construction of the Act, however, was explicit and direct. 686 F.2d at 713 n. 6.

[11]As the Court pointed out in another recent decision:

> The interpretation put on the statute by the agency charged with administering it is entitled to deference [citations omitted], but *the courts are the final authorities on issues of statutory construction.* They must reject administrative constructions of the statute, whether reached by adjudication or by rulemaking, that are inconsistent with the statutory mandate or that frustrate the policy that Congress sought to implement.

The Court's analysis in that case is remarkably apposite here. The Court noted that the statutory scheme itself was detailed and comprehensive, that there was statutory language directly indicating a Congressional intent to continue a policy which had been in effect for many years, and that there was no clear language showing an intent to change that policy by excluding a significant source of natural gas production from the pricing structure. Therefore, it held that the Federal Energy Regulatory Commission could not exclude pipeline production by rule.

Similarly, the Regional Act is comprehensive in its provision for the allocation of power. It expressly states that all power sales are to be subject to preexisting preference and priority statutes. The Act contains no indication of an intent to create, or to allow BPA to create, an exception to the long-standing policy expressed in those provisions.

Petitioners and BPA cite many cases containing general language about deference to statutory construction by administrative agencies. That language must be considered in light of the context in which it was used."

In many of the cited cases the agency was carrying out a Congressional mandate to exercise extremely broad powers of a legislative nature or to give specific content to

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*Federal Election Commission v. Democratic Senatorial Campaign Committee*, 454 U.S. 27,32 (1981). [Emphasis added; citations omitted.] The Ninth Circuit in this case did precisely what that passage requires.

"In *Udall v. Tallman*, 380 U.S. 1 (1965), for example, the Court was deferring to an agency's interpretation of its own orders and regulations. Similarly, the major problem in *Power Reactor Development Co. v. Int'l Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961) was the construction of the agency's own regulation. *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940), did not involve interpretation by an agency at all. The Court concluded that Congress was satisfied with a long-standing *judicial* construction of the Sherman Act.

very general statutory language."[9] No such discretion is involved here.

Even when discretion of that kind has been delegated to an agency, it is only the agency's *reasoned* exercise of authority *at the time* which is entitled to deference. Courts are under no obligation to defer to arguments proposed by counsel, in litigation, as after-the-fact attempts to justify the agency's action. *Investment Company Institute v. Camp*, 401 U.S. 617, 627-28 (1971). The court owes no deference whatsoever to arguments advanced for the first

[9] *American Paper Institute v. American Electric Power Service Corp.*, _____ U.S. _____, 103 S. Ct. 1921 (1983) (FERC directed by statute to set rates which were "just and equitable" and "in the public interest," and to make "such rules as it determines necessary to encourage cogeneration and small power production"); *Blum v. Bacon*, 457 U.S. 132 (1982) (approving regulations specifying necessary content of state public assistance plan to be approved by Secretary of HEW, under authority to promulgate rules "not inconsistent with this chapter, as may be necessary . . ."); *CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367 (1981) (statute authorized FCC to revoke broadcasting license for failure to provide "reasonable" access and directed it to make rules as "may be necessary"); *Board of Governors v. Investment Company Institute*, 450 U.S. 46 (1981) (Federal Reserve Board's authority to determine that certain activities were "so closely related to banking . . . as to be a proper incident thereto"); *E.I. DuPont de Nemours & Co. v. Collins*, 432 U.S. 46 (1977) (SEC directed to determine whether proposed merger was "reasonable and fair" or "involved overreaching"); *Mourning v. Family Publications Service*, 411 U.S. 356 (1973) (Congress directed Federal Reserve Board to make rules to carry out purposes of Truth in Lending Act, expressly including authority to adopt provisions, in its judgment, necessary or proper to prevent circumvention or evasion of the Act); *Ford Motor Credit Co. v. Milhollin*, 444 U.S. 555 (1980) (same statute; court deferred to interpretation of the Act and of Board's regulation by Board and staff, noting specific Congressional action to promote reliance on such interpretations); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969) (FCC directed by Congress to make rules as required by public convenience, interest or necessity, and to "consider the demands of the public interest"); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933) (Tariff Commission authorized to promulgate "reasonable" procedure and rules and to give interested parties "reasonable opportunity" to be heard).

A comparable provision of the Regional Act that might require the Administrator to give specific content to statutory language is the requirement that the Administrator recover through such "provisions, as the Administrator deems appropriate" any advances made under section 6 to assist in the development of a resource. *See* 16 U.S.C. §839d(f)(3).

time in this litigation which constitute merely "counsel's *post hoc* rationalizations for agency action . . . ." *Id.* at 628, *quoting Burlington Truck Lines v. United States*, 371 U.S. 156, 168-69 (1962). *See* pp. 20-21 *supra*.

In other cases in which this Court deferred to an agency's interpretation, the agency's task was to make factual or technical determinations within its field of special expertise.[90] The preference and priority provisions of the Regional Act are simple and straightforward. It is the arguments of petitioners and BPA which are technical and complicated.

Finally, many of the cases upon which petitioners and BPA rely simply uphold an agency practice or interpretation which Congress had allowed to continue over a substantial period of time.[91] They offer no support for deference to an abrupt change of interpretation.

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[90] *E.I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46 (1977) (determination by SEC that management investment company was properly valued according to market value of its stock holdings); *Board of Governors v. Agnew*, 329 U.S. 441 (1947) (determination by Federal Reserve Board that particular firm was "primarily engaged" in underwriting); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143 (1946) (determination by territorial Unemployment Compensation Commission that particular labor dispute was in "active progress" at specific time).

A comparable determination under the Regional Act might be a determination, whether a resource the Administrator proposes to acquire under section 6(d) is an "experimental, developmental, demonstration, or pilot project" and has a "potential for providing cost-effective service." *See* 16 U.S.C. §839d(d).

[91] *CBS, Inc. v. Federal Communications Commission*, 453 U.S. 367 (1981) (9 years); *Howe v. Smith*, 452 U.S. 473 (1981) (29 years); *E.E.O.C. v. Associated Dry Goods Corp.*, 449 U.S. 590 (1981) (15 years); *Andrus v. Shell Oil Co.*, 446 U.S. 657 (1980) (60 years); *United States v. Rutherford*, 442 U.S. 544 (1979) (over 18 years); *Board of Governors v. First Lincolnwood Corp.*, 439 U.S. 234 (1978) (22 years); *Zenith Radio Corp. v. United States*, 437 U.S. 433 (1978) (over 80 years); *Power Reactor Development Co. v. Int'l Union of Electrical, Radio and Machine Workers*, 367 U.S. 396 (1961) (6 years); *Norwegian Nitrogen Products Co. v. United States*, 288 U.S. 294 (1933) (more than 11 years).

In every one of the above cases, the Court found specific evidence that the agency's interpretation had been reviewed and acquiesced in by Congress after the enactment of the legislation in question, often on more than one occasion.

None of the cited cases holds that an agency can create an exception to mandatory statutory language in reliance on indirect inference:

> This Court has firmly rejected the suggestion that a regulation is to be sustained simply because it is not "technicially inconsistent" with the statutory language, when that regulation is fundamentally at odds with the manifest congressional design. *United States v. Cartwright*, 411 U.S. 546, 557, 93 S. Ct. 1713, 36 L.Ed.2d 528 (1973). The challenged regulation is not a reasonable statutory interpretation unless it harmonizes with the statute's 'origin and purpose.' *National Muffler Dealers Assn. v. United States, supra*, 440 U.S. at 477, 99 S. Ct. at 1307" *United States v. Vogel Fertilizer Co.*, 455 U.S. 16, 26, 102 S. Ct. 821, 828 (1982).

Nor can it be avoided by reference to obscure and ambiguous legislative history. In *Zuber v. Allen*, 396 U.S. 188 (1969), the Secretary of Agriculture argued that Congress had approved certain marketing differentials because computations supporting a similar differential had been included in a report to Congress. The Court rejected that argument because the "stark figures" in the appendix had not been the subject of discussion so as to give the matter "notoriety." 396 U.S. at 194. The agency's participation in the drafting of the legislation did not convince the Court that the agency's proposed proposed construction was correct. The agency had not made that construction known to Congress. 396 U.S. at 193.

BPA's reliance on legislative history in this case is no more persuasive. *See* pp. 36-41 *supra*. Its present construction was never called to the attention of the many members of Congress who assured that there would be *no* change in the rules of preference and priority.

The principle of deference to agency interpretation sometimes provides a framework for judicial analysis in statutory construction.[92] It "does not displace" that analysis. *United States v. Vogel Fertilizer Co. supra*, 455 U.S. 24, 102 S. Ct. 827, *quoting United States v. Cartwright*, 411 U.S. 546, 550 (1973). The Ninth Circuit, which has long experience in the operation of preference clauses and federal power marketing policy,[93] properly analyzed the Regional Act. Its conclusions are correct under the rules announced by this Court in *United States v. Rutherford*, 442 U.S. 544 (1979):

> Exceptions to clearly delineated statutes will be implied only where essential to prevent 'absurd results' or consequences obviously at variance with the policy of the enactment as a whole. 442 U.S. at 552.
>
> Only when a literal construction of a statute yields results so manifestly unreasonable that they could not fairly be attributed to congressional design will an exception to statutory language be judicially implied. 442 U.S. at 555.

BPA's proposed interpretation would turn those rules upside down.

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[92] In fact, this Court often decides that an administrative agency has incorrectly construed an act of Congress without any mention at all of principles of deference. Recent examples include: *Dirks v. Securities and Exchange Commission*, _____ U.S. _____, 103 S. Ct. 3255 (1983); *Edward J. DeBartolo Corp. v. N.L.R.B.*, _____ U.S. _____, 103 S. Ct. 2926 (1983); *see also F.C.C. v. Midwest Video Corp.*, 440 U.S. 705, 708 (1979) (Court refused to defer when Congressional intent to limit agency's broad rulemaking authority was clear from other provisions of the act).

[93] *See, Anaheim v. Duncan*, 568 F.2d 1326 (9th Cir. 1981); *Anaheim v. Kleppe*, 590 F.2d 285 (9th Cir. 1978); *City of Santa Clara v. Andrus*, 572 F.2d 660 (9th Cir. 1978), *cert. denied sub nom. Pacific Gas & Electric Co. v. City of Santa Clara*, 439 U.S. 859 (1978); *Arizona Power Pooling Association v. Morton*, 527 F.2d 721 (9th Cir. 1975), *cert. denied sub nom. Arizona Public Service Co. v. Arizona Power Pooling Association*, 425 U.S. 911 (1976).

## CONCLUSION

The Court should affirm the judgment of the Ninth Circuit Court of Appeals.

Respectfully submitted,

By _____
JAY T. WALDRON
*Counsel of Record*

DONALD A. HAAGENSEN
MILDRED J. CARMACK
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October 11, 1983

# APPENDIX

(AUTHENTICATED COPY)

[Department Seal]

Department of Energy
Bonneville Power Administration
P.O. Box 3621
Portland, Oregon 97208

DE-M 579-81BP90343
Office of the Administrator

In reply refer to: PCI

Aug. 27, 1981

Mr. B. D. Cocknell
Aluminum Company of America
1501 Alcoa Building
Pittsburgh, PA 15219

Mr. B. D. Cocknell
Northwest Alloys, Inc.
Aluminum Company of America
1501 Alcoa Building
Pittsburgh, PA 15219

Dear Mr. Cocknell:

In response to your request to be offered the power sales contract under the Pacific Northwest Electric Power Planning and Conservation Act, this written offer is sent to you for your consideration.

The enclosed four copies of the initial long-term power sales contracts are the result of the negotiation process just completed. Please note that the Bonneville Power Administrator has already signed this contract. The signed contract constitutes a firm offer as required by the Regional Act. Your Company has one year from the date it receives this offer to accept it by signing and returning the contract to Bonneville.

Bonneville is aware that the Industrial Purchasers do not necessarily agree with Bonneville on the existence or the extent of Bonneville's right to displace all or any of its available resources in a manner that would reduce the availability of power for service to the first quartile of the Industrial Purchasers' load. It is not Bonneville's intent to resolve this disagreement in the attached contract. Rather, as indicated in section 7(c) of the attached contract, Bonneville's displacement actions are to be undertaken only subject to Bonneville's legal rights, legal obligations, and policies concerning displacement. When such policies are developed, the Industrial Purchasers will have the opportunity to participate in the policy development and, if dissatisfied by the result, to contest it. By executing the attached contract, no Industrial Purchaser will waive any right or claim with respect to this issue. [*]

This contract is the initial contract that Bonneville is required to offer each Industrial Purchaser pursuant to sections 5(d) (1) (B) and 5(g) of the Regional Act. As you know, the Act contemplates in section 5(d) (1) (B) additional, future contracts with each exisiting Industrial Purchaser, but [p.2] unlike this initial contract, such future contracts do not have the benefit of the statutorily deemed sufficiency of power available to the Administrator under section 5(g)(7). Bonneville's ability to offer any future contracts to its nonpreference customers, including the Industrial Purchasers, is therefore largely dependent upon Bonneville achieving firm load/resource balance while these initial contracts are in effect. Bonneville is aware that most, if not all, of the Industrial Purchasers are necessarily considering substantial new capital investment at their exisiting facilities during the period of the initial contracts, and that as a result the useful life of these facilities may be extended well beyond the 20-year term of the initial contracts. We hope you will find section 12 of the attached contract responsive to some of the concerns that have been expressed as to Bonnevilles' [sic] recognition of your need for future, as well as immediate, power planning

*This is the significant paragraph that Petitioners' omitted from their Appendix to the Petition for certiorari.

certainty. We would certainly expect future Bonneville officials to recognize this need as well. At the same time, Bonneville's obligation to maintain load/resource balance through the efforts of its Customers and other non-Federal entities, and the goal of achieving load/resource balance in making possible future contracts and a continuing program under the Regional Act, needs to be borne in mind by the Customers as well as by Bonneville.

Bonneville has recently conducted cash flow analyses that indicate that should there be substantial Industrial Purchaser curtailment below sales projected in designing Bonneville's 1981 wholesale power rates, Bonneville would experience severe cash flow difficulties, potentially of such a magnitude as to endanger Bonneville's ability to purchase necessary power. In the contract negotiations all parties recognized that Bonneville needs to minimize cash flow problems, and that consequently a method should be agreed upon for dealing with underrecoveries of costs incurred pursuant to section 5(c) of the Regional Act at intervals prior to July 1, 1985. Bonneville recognizes that this was not solved during the negotiation of the contract, however, our recent review of the potential cash flow problems convinces us that it is imperative to resolve this issue now.

Bonneville intends to resolve this problem in future years through policies of general applicability in its annual rate proceeding. One possible way to deal with the particular cash flow problem resulting from DSI curtailments would be, if a DSI reduced its Operating Demand upon notice prior to the beginning of the Contract Year pursuant to section 5(b) (4) of the new contract, Bonneville could reallocate the cost of exchange resources or reduce the amount of purchases it otherwise might have to make.

We believe that this resolution is consistent with the legal obligations imposed by section 7(b) (3) and section 7(c) (1) (A) of the Regional Act, and does not prejudice the right of

any person or entity to present and to have considered any arguments or evidence it may wish to present in Bonneville's rate proceedings conducted pursuant to section 7 of the Regional Act. The following conditions will aid Bonneville's cash flow needs, and do not [p.3] establish or alter any ultimate legal obligation of the Industrial Purchasers under the Act for the payment of any particular costs. The firm offer contained in the enclosed contract, therefore, is conditioned upon the following:

> If Bonneville determines after consultation with the Industrial Purchasers that: (1) in any month during the rate period total power sales to all Industrial Purchasers have fallen below 90 percent of the monthly projection of the total Industrial Purchaser load contained in Bonneville's 1981 wholesale power rate filing because of voluntary curtailments by Industrial Purchasers; (2) Bonneville projects significant cash flow problems as a result of such voluntary curtailments; and (3) Bonneville determines that it is unable to mitigate the shortfall in revenues resulting from such curtailments by selling energy made available because of such curtailment, reducing purchases or some other method, then Bonneville shall include in each Industrial Purchaser's next regular power bill the Purchaser's share of the shortfall resulting from such curtailments (less any savings realized by Bonneville's best efforts to mitigate the shortfall) based on the proportion of the Purchaser's projected Operating Demand to the total projected Operating Demands of all Industrial Purchasers executing new DSI Contracts, as contained in Bonneville's letter to your company dated August 14, 1981. This surcharge shall be superseded when Bonneville's wholesale power rates to the Industrial Purchasers provide for recovery of such shortfalls.

> Any amount paid by a Purchaser pursuant to this provision shall be credited to the Purchaser's benefit when Bonneville computes the amount that the Purchaser will pay or receive under section 7(b) (3) of the Regional Act.

Bonneville believes that the foregoing shortfall provision is necessary to assure operations consistent with sound business principles. The shortfall provisions will not be invoked unless volutary curtailment is greater than 10 percent and a significant cash flow difficulty arises. Even then, Bonneville will use its best efforts to mitigate any revenue shortfall by selling the curtailed power or displacing any purchases to the extent possible while still meeting Bonneville's contractual obligations.

I regret that this matter has arisen at this late date but we believe that our obligation to recover our costs requires that we condition the offer of the long term contract on this provision, recognizing that in the future, such potential revenue shortfalls will be dealt with in Bonneville's rate proceedings.

[p.4] If your Company finds the provisions of the contract and the above condition acceptable, please have the appropriate officials sign this contract and the copy of this letter and fill in the execution date of the contract on page 2. Please return one copy of each document to Bonneville and keep remaining copies for your files.

Please contact our office if you have any questions.

Sincerely,

/S/ Peter T. Johnson

Administrator

Enclosures

Company **Aluminum Company of America**
Executed by **/S/ R. Arnold Kramer**
Title **Executive Vice President**

Company **Northwest Alloys, Inc.**
Executed by **/S/ J. Reid Clark**
Title **Vice-President**